

Public Sector Collective Bargaining: New Mexico Need Not Follow California Into the Fiscal Abyss

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Introduction

The recent economic downturn and pressure placed on all government budgets has caused an examination of why and how state and local governments have accrued such high levels of sovereign debt. It has become clear that those in charge of running the government have no fiscal discipline when economic times are good and governmental coffers are flush.

The concept of saving for a rainy day is an alien idea when it comes to government. During good times there is pressure by various special interest groups to spend every penny taken in by government, and even more so by promising government entitlements without paying for them. Nevertheless, the recent debate about whether government employees should experience compensation freezes or reductions, like many have in the private sector, should draw attention to yet an issue that has exacerbated if ultimately not caused most of the government fiscal problems. That issue is the practice known as public sector collective bargaining along with related public sector union political activity.

In this paper I will discuss the subject of public sector collective bargaining, how it evolved and the fiscal damage it has caused to our state and local governments particularly. I will review the history of public sector collective bargaining in New Mexico and where we find ourselves in relation to public sector unionism and collective bargaining.

In New Mexico we have an opportunity, even after the binge spending over the last seven years by the state government, to put on the brakes and hopefully avoid putting our taxpayers and citizens in the dilemma that California, Illinois, New Jersey and others find themselves in today. This can only be accomplished by avoiding the pitfalls that California has experienced where public sector unions have effectively taken over state and local governmental decision making through the process of collective bargaining and political activity electing public officials who are beholden to the public sector unions.

What are Labor Unions and Collective Bargaining?

Trade or labor unions are organizations of workers who have banded together to achieve common goals. Labor unions originated not in the classical world--Greece or Rome--but in Europe during the industrial revolution and are seen by some as successors to the guilds of medieval times. Such medieval guilds were formed to limit the entry of individuals into various trades and thereby enhance the incomes of its members by limiting competition in the field.

Originally, trade unions were outlawed by the Ordinance of Labourers adopted in England in 1349 and remained illegal until the beginning of the 19th century.¹ Labor unions in the United States were originally created primarily to organize strikes, but, now, the real function of labor unions is to bargain collectively with its members' employers as to the terms and conditions of employment and to engage in political activity to enhance its members compensation and the union's political clout and influence.

Collective bargaining can be defined generally as a process designed to reach an agreement regarding terms and conditions of the employment between employees and employers. Collective bargaining aims to reach a collective agreement which usually sets out issues such as employees pay, working hours, training, health and safety, and rights to participate in workplace or company affairs.

¹ <http://www.fordham.edu/halsall/seth/ordinance-labourers.html>

Collective bargaining between employers and employees in the private sector was codified in the National Labor Relations Act passed by Congress in 1935.² However, collective bargaining in the public sector, between the government and its employees, did not begin until much later.

Public Sector Unionism and Collective Bargaining

Throughout American history -- and as recently as the 1950s -- there were no unions for government workers and no collective bargaining between workers and their government employers.³ Public sector employees were expected to earn a bit less than their private sector equivalents in return for job security, reasonable benefits and the privilege of working as a public servant.

The number of states allowing collective bargaining for public sector workers jumped from one in 1955 to 10 in 1965.⁴ Then in 1958 New York City Mayor Robert Wagner in an appeal to city workers for votes, signed an executive order authorizing New York City workers to unionize, and soon other local and state legislators around the country began to follow his lead.⁵

In 1962, President John F. Kennedy granted federal employees the right to collectively bargain by signing Executive Order 10988.⁶ Since then, public sector union membership has increased significantly while, in the private sector, union membership has fallen. And, in 2009, for the first time in the United States, public sector unions counted more members than unions in the private sector.⁷

It is reported that today 26 states have collective bargaining for all state and local workers, twelve states have collective bargaining for a portion of their state and local workers and as of 2002, approximately 12 states have no collective bargaining in the public sector.⁸

But, what effect do public sector unions really have on government? And, isn't it fair to let government workers collectively bargain with their government employers the same way their counterparts do in the private sector? The simple answer is "no." To illustrate the problem, we only need look to the California experience where runaway public sector unionism and collective bargaining along with related political activity by public sector unions has put the state and many local government into a state of insolvency which is going to be difficult to overcome.⁹

Public Sector Unionism and the "state" of California

In 1968 the California legislature passed the Meyers-Milias-Brown Act extending collective bargaining rights to municipal, county, and local special district employers and employees.¹⁰ The

² 29 U.S.C. §§ 151-169 (1935)

³ See Henry S. Farber, "Union Membership in the United States," Working Paper 503, Industrial Relations Section, Princeton University, September 2005.

⁴ Farber (2005) at p. 5.

⁵ O'Neal, T., and McMahon, E.J. (2007) "Taylor Made: The Cost and Consequences of New York's Public-Sector Labor Laws." Empire Center for New York State Policy (October).

⁶ <http://www.presidency.ucsb.edu/ws/index.php?pid=58926>

⁷ Greenhouse, Steven, *Most U.S. Union Members are Working for the Government, NewData Shows*, New York Times (January 23, 2010).

⁸ Government Accountability Office, "Collective Bargaining Rights," September 2002, p. 8.

⁹ See generally, Malanga, Steven, *The Beholden State: How public-sector unions broke California*. City Journal, Spring 2010, Vol. 20, No. 2. (http://www.city-journal.org/2010/20_2_california-unions.html)

¹⁰ <http://www.perb.ca.gov/laws/statutes.asp>

California legislature then enacted the Educational Employment Relations Act of 1976 establishing collective bargaining in California's public schools (K-12) and community colleges.¹¹

Next the Ralph C. Dills Act also known as the State Employer-Employee Relations Act of 1978 was enacted by the legislature establishing collective bargaining for California state government employees.¹² The Higher Education Employer-Employee Relations Act of 1979 was then enacted extending the collective bargaining rights to the California State University System, the University of California System and Hastings College of Law employees.¹³

During this time government jobs in California grew commensurate with the rise of the public sector unions and their right to collectively bargain from 874,000 in 1960 to 1.6 million in 1980 to 1.93 million in 1990 to 2.2 million in 2000, and to 2,517,900 in May of 2010.¹⁴ Members of public sector unions in California grew from 694,906 in 1983 (or 43.4% of government workers) to 905,697 in 1990 (46.7%) to 1,252,927 in 2000 (50.3%) to 1,320,024 (55.8%) in 2009.

Teachers' union membership in California grew from 170,000 in the late 1970s to 225,000 in the late 1990s to about 340,000 today.¹⁵ This provides some idea of the explosive increase in public sector union membership in California since the legislature enacted all of the collective bargaining statutes enumerated above.

Also, in 1966 the California legislature enacted AB 80 which provided that assessments of real property in California be kept at a uniform percentage of market value. This law had the effect of significantly raising property taxes in the 1970s as the California economy grew explosively. This phenomenon resulted in the passage by initiative in 1978 of Proposition 13, limiting property taxes, by a vote of 65-35%.¹⁶ The taxpayer revolt in California was firmly put in place.

The effect or perception of Proposition 13 on government revenues and public school funding, depending on your point of view, set off a chain reaction of public sector union activity in California. In 1980 local California government workers engaged in 40 illegal strikes. Then, in 1985, the California Supreme Court, and not the California legislature, sanctioned the right of public employees to strike.¹⁷

As the California economy grew so did the government. As the government grew, so did government worker union membership. As the government union membership grew, so did the union coffers through mandatory union dues. As the unions funds grew so did their political activity and power, including involvement in elections of public officials and participation in initiative elections.¹⁸ What follows is a brief rendition of some of the union organizations that grew up during this period and their activities and effect on the California government and public finances.

¹¹ <http://www.perb.ca.gov/laws/default.asp>

¹² <http://www.perb.ca.gov/laws/dills.asp>

¹³ <http://www.perb.ca.gov/laws/heera.asp>

¹⁴ www.bls.gov

¹⁵ Malanga (2010) (http://www.city-journal.org/2010/20_2_california-unions.html)

¹⁶ http://www.leginfo.ca.gov/.const/.article_13A

¹⁷ Malanga (2010) (http://www.city-journal.org/2010/20_2_california-unions.html)

¹⁸ Any California voter can put an initiative or a referendum on the ballot by obtaining a certain number of signatures pursuant to California Constitution , Article II, Section 8 (b)

- **California Teachers Association**

The California Teachers Association (CTA), established in 1863 as the California Educational Society, is the largest union in California.¹⁹ However, explosive growth in CTA membership has really occurred more recently. The CTA counted 170,000 members in the late 1970s, 225,000 members in the 1990s and 340,000 today.²⁰

The CTA's political activity began in earnest after the adoption of Proposition 13. In response to the tax revolt, California government workers went into action. In 1980 California experienced 40 illegal strikes by local workers. In 1985 the California Supreme Court legalized strikes by local government workers in the absence of a statute authorizing such strikes passed by the legislature.²¹

And, during this same time period, the CTA became more and more politically active. One of the CTA's efforts was to elect union-friendly candidates to school boards. Then in 1988, the CTA successfully supported Proposition 40, an initiative which mandated that 40% of the California state budget, whatever it is, be spent on public schools. This resulted the following year in an increase of \$450 million being sliced from other programs in the California budget much of which went to teacher salaries.²²

CTA's political efforts then began to address political subject matter which was not related to education. In 1994 the CTA opposed measures that prohibited illegal immigrants from acquiring and using state government services and banning the state from recognizing gay marriages performed outside of California.²³

In 2005 the CTA spent \$74 million opposing ballot measures including Proposition 74 which would have extended the probationary period for public school teachers from two to five years before they could obtain tenure. In the same election, CTA opposed Proposition 75 which prohibited a union's use of members' dues for political purposes without the union members consent. And, finally, the CTA opposed Proposition 76 which would have constitutionally limited state spending through a number of fiscal reforms. All three of these initiatives were defeated with the help of CTA union members' dues, plus funds from a mortgage on the CTA headquarters in Sacramento.²⁴

After the tax revolt that spawned Proposition 13, the CTA did not limit itself to political activity. In 1989 alone, teacher strikes in California cost California public school students 7.2 million classroom days. And, California students were urged by the CTA to support these strikes by skipping school.²⁵

- **California Correctional Peace Officers Association (CCPOA)**

The California Correctional Peace Officers Association (CCPOA) was founded in 1957 to represent prison guards.²⁶ The organization remained relatively weak until the 1980s when a number of bargaining units were consolidated under its representation growing the membership to 1600. Beginning in the 1980s, the state of California built 22 new correctional institutions in the course of 25 years. This

¹⁹ www.cta.org

²⁰ Id.

²¹ Malanga (2010) (http://www.city-journal.org/2010/20_2_california-unions.html)

²² Id.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ <http://www.ccpoa.org>

explosion in the construction of prisons resulted in increased membership of the CCPOA from 17,000 in 1988 to 25,000 members in 1997 to approximately 31,000 members today.²⁷

The rise of the CCPOA political clout is legendary in California. In 1992 the CCPOA became California's second largest political action committee contributing over \$1 million to legislative candidates. It then contributed over \$1 million to Pete Wilson's successful campaign for governor. In 1998 CCPOA gave \$1.5 million to the gubernatorial campaign of Gray Davis and spent an additional \$1 million on his behalf in independent ads. After his 2002 reelection as governor, Davis approved a 34% pay hike for CCPOA members costing over \$2 billion over the life of the contract and increasing average base salaries of the members, not including benefits, from \$50,000 to \$65,000. Eight weeks later, the CCPOA donated another \$1 million to the Davis campaign.²⁸

Today, the CCPOA has an annual budget of over \$25 million and employees 70 persons including 20 lawyers. It has been described as having many political action committees deeply involved in lobbying and political spending exceeding all other labor unions in California.²⁹

- **California Service Employees International Union**

In 1984, the California State Employees Union affiliated with the Service Employees International Union (SEIU). Thereafter, the SEIU began efforts to have home health care workers working as independent contractors declared to be government employees. Such a change in status would make such workers eligible to be unionized. SEIU won their case in court and then won representation of 74,000 such workers in Los Angeles County alone. The SEIU now represents over 700,000 members in California.³⁰

SEIU has used its members' funds in such efforts as spending \$20 million in 2005 opposing an initiative to cap government growth in California and put reasonable limits on union power. They have engaged in other political efforts including supporting a 2004 initiative for a millionaire's tax and supported living wage laws in San Francisco and Los Angeles. And, in 2003 they engaged in a political effort to pressure the board of the California Public Employees Retirement System to stop investing government pension funds in companies that outsource government jobs to the private sector.³¹

- **California Organization of Police and Sheriffs (COPS)**

The California Organization of Police and Sheriffs (COPS) was formed in 1975.³² Today, COPS claims to represent the interests of over 100,000 peace officers and their families and over 1,000,000 citizen members in California, Nevada, and Hawaii.³³ While representing some of our most revered public servants, the police and other law enforcement officers, COPS has gained a controversial reputation and has become better known for its fundraising efforts than anything else.

In 1999 the Associate Press reported that COPS raised funds by employing telemarketers that threatened Hispanics with cutting off their 911 service, impersonated police officers and employed

²⁷ Malanga (2010) (http://www.city-journal.org/2010/20_2_california-unions.html)

²⁸ Id.

²⁹ http://en.wikipedia.org/wiki/California_Correctional_Peace_Officers_Association

³⁰ <http://www.seiuc.org/Industries/Default.aspx>

³¹ Malanga (2010) (http://www.city-journal.org/2010/20_2_california-unions.html)

³² <http://www.ca-cops.com/history.html>

³³ Id.

solicitors with criminal backgrounds.³⁴ Between 1996 and 1999, COPS using such tactics raised \$6.48 million while an investigation by the *Orange County Register* found that 88 cents of every dollar was eaten up by fund raising costs.³⁵ The remaining 12% of the funds were expended to pay for services such as legal counsel for its members, legislative lobbying and recruitment efforts, and travel for board members to meetings in Hawaii and Palm Springs.³⁶

Other alleged COPS fund raising abuses include sending out brochures at consumers' requests and then later trying to collect a donation by claiming the consumer made a pledge.³⁷ Also, during this same time frame politicians such as Governor Gray Davis and Senator Barbara Boxer paid thousands of dollars to have their names on COPS' political mailers in the hope that the COPS' endorsement would give the appearance of strong law-enforcement backing.³⁸

These types of activities by COPS are not just the politics of the past. The organization has as recently as 2009 been sued by the current California Attorney General and 2010 Democratic gubernatorial candidate, Jerry Brown, for illegally soliciting and expending charitable funds.³⁹ This is all being done by an organization that was formed, purportedly, to represent police and sheriffs officers on labor issues. Apparently, even an organization like COPS can be corrupted by the love of money.

The Consequences for California

Why the long analysis of California? Because this history has made what Steven Malanga of the Manhattan Institute has termed the "Beholden State" due to the public sector unions strangle hold on California state and local government and those who are elected to and run those governments.⁴⁰

In California 9,111 retired government workers and 3,090 retired public school teachers receive a pension of over \$100,000 per year.⁴¹ State pension costs in California have increased 2500% in the last decade. As of 2008, the state of California had an unfunded pension liability of \$63 billion, but in reality there is what the Los Angeles Times calls "California's \$500 billion pension time bomb" referring to the collective unfunded liability of all California government pension plans.⁴²

As of this writing the California Legislature still has not passed a budget for the upcoming fiscal year. The Legislature is locked down between Republicans who refuse to raise taxes and Democrats who refuse to cut government spending. This has resulted in Governor Arnold Schwarzenegger ordering state employees be paid the federal minimum wage, an act that has been upheld by the California Supreme Court against the opposition of the State Controller.⁴³

³⁴ <http://laprensa-sandiego.org/archieve/march05/lies.htm>

³⁵ Id.

³⁶ Id.

³⁷ <http://www.indybay.org/newsitems/2007/07/12/18434965.php>

³⁸ Id.

³⁹ http://ag.ca.gov/cms_attachments/press/pdfs/n1746_california_organization_of_police_and_sheriffs.pdf;
<http://articles.latimes.com/2009/may/30/business/fi-charity-fraud30>

⁴⁰ Malanga (2010)

⁴¹ The names and pensions of the retirees may be found at <http://database.californiapensionreform.com>.

⁴² David Crane, Opinion, *California's \$500 billion pension time bomb*, Los Angeles Times, April 6, 2010. See also *Pension Bomb Ticks Louder. California's public funds are assuming unlikely rates of return*, Wall Street Journal, Review & Outlook, April 27, 2010.

⁴³ *Schwarzenegger Minimum-Wage Plan is Legal, Judge Says*, Bloomberg Businessweek, August 29, 2010 (<http://www.businessweek.com/news/2010-07-02/schwarzenegger-minimum-wage-plan-is-legal-judge-says.html>)

More recently Governor Schwarzenegger has ordered all state employees to take three unpaid furlough days per month.⁴⁴ The state has had to pay its debts from time to time through the crises with IOUs and is in danger of losing its bond ratings.⁴⁵ The current California state budget deficit stands at \$19+ billion dollars.⁴⁶ Governor Schwarzenegger is asking the California Public Employees Retirement System (CalPERS) for a \$2 billion loan to help balance the budget, but the last time the state borrowed money from the retirement plan it had to pay CalPERS \$400 million in interest.⁴⁷

All of this has resulted in a state economy in shambles. The unemployment rate in California is 12.3%.⁴⁸ And a \$12 billion tax increase in February of 2009 has done little to help. California's economic problems haven't been limited to the state government.⁴⁹ The city of Vallejo has filed for bankruptcy which will have the effect of obviating its pension obligations.⁵⁰ The City of Orange spent \$13 million on pensions in 2009 and expects this number to rise to \$23 million in three years. In Los Angeles, one half of the city's \$7 billion budget goes to employee salaries which is one of the factors contributing to a budget shortfall of hundreds of millions of dollars currently and a projection of \$1 billion in a few years. This after the city handed out a 23% pay increase to city employees in 2007.⁵¹

And lest there be some doubt about whether the financial problems of California are recognized across philosophical and political lines, consider the comments of some of California's political leaders. California's State Treasurer and former Attorney General, Democrat Bill Lockyer recently stated:

"It's absolutely critical that the governor and legislature quickly adopt a budget that's free of hope-and-a-prayer math and legal clouds. Every day without a credible plan brings us closer to deterioration of the State's credit rating and the humiliation of IOUs"

Lockyer went on to note that everyday without a budget after the new fiscal began increased the budget deficit by \$50 million.⁵²

Governor Arnold Schwarzenegger, a Republican stated that "we are about to get run over by a locomotive. We can see the light coming at us." Schwarzenegger then went on to impose the federal minimum wage on all state workers pending a resolution of the budget, a move which was opposed by the states Comptroller but was approved by the California State Court of Appeals.⁵³

But, even more remarkably, California's legendary Willie Brown, the former Speaker of the California Assembly and Mayor of San Francisco, has weighed in on the problem. He has said "I don't come to this issue, frankly, with clean hands. I did a lot of stuff when I served as a member of the Legislature." Brown went on to describe the situation quite accurately as follows:

⁴⁴ <http://www.csmonitor.com/USA/Politics/2010/0819/As-California-budget-deadlock-drags-state-set-to-pay-steep-price>

⁴⁵ *As California budget deadlock drags, state set to pay steep price*, Christian Science Monitor, August 19, 2010 (<http://www.csmonitor.com/USA/Politics/2010/0819/As-California-budget-deadlock-drags-state-set-to-pay-steep-price>)

⁴⁶ <http://www.bloomberg.com/news/2010-08-20/schwarzenegger-said-to-seek-2-billion-from-calpers-for-california-budget.html>

⁴⁷ <http://www.sacbee.com/2010/08/21/2973258/calpers-loan-sought-by-schwarzenegger.html>

⁴⁸ U.S. Bureau of Labor Statistics, <http://www.bls.gov/bls/unemployment.htm>

⁴⁹ <http://articles.latimes.com/2009/feb/20/local/me-california-budget20>

⁵⁰ Don Bellante, David Denholm, and Ivan Osorio, "Vallejo Con Dios Why Public Sector Unionism Is a Bad Deal for Taxpayers and Representative Government." Cato Institute, Policy Analysis No. 645, Sept. 28, 2009.

⁵¹ Malanga (2010) (http://www.city-journal.org/2010/20_2_california-unions.html).

⁵² <http://www.treasurer.ca.gov/>

⁵³ *Schwarzenegger Minimum-Wage Plan is Legal, Judge Says*, Bloomberg Businessweek, August 29, 2010 (<http://www.businessweek.com/news/2010-07-02/schwarzenegger-minimum-wage-plan-is-legal-judge-says.html>)

“The deal used to be that civil servants were paid less than private sector workers in exchange for an understanding that they had job security for life. But we politicians – pushed by our friends in labor -- gradually expanded pay and benefits . . . while keeping the job protections and layering on incredibly generous retirement packages.”

And in a moment of newly found political candor Brown has recently stated “[w]hen I was Speaker, I was in charge of passing spending. When I became mayor I was in charge of paying for that spending. It was a wake-up call.”⁵⁴

And, none other than former Democrat Governor Gray Davis, who by any measure has been largely responsible for the problem due to his fealty to the public sector unions when he was governor, has now become a believer. He has recently made the following comments:

“Pension reform is essential. You just can’t afford the benefits that have been promised because all the actuarial studies turned out to be wildly optimistic. We have no choice now, and if I was governor, I would be doing exactly what Arnold is trying to do, which is require people to contribute more to their pensions.”⁵⁵

It is difficult to see how California rescues itself in light of the politics—Republicans digging in against new taxes and Democrats and public sector unions digging in against spending cuts and pension reforms—and the depth of the financial problem it finds itself in. Time will tell. However, New Mexico and some other jurisdictions are fortunate as they now have a blue print that foretells the future as to what is going to happen if they continue on the unlimited spending binge they are on thanks to the example set by California.

Public Sector Unionism and Collective Bargaining in New Mexico

Public sector collective bargaining was not an issue in New Mexico until the 1950s spurred on by Mayor Wagner’s actions in New York and other state’s actions as discussed previously. However, union activists in New Mexico who could not get public sector collective bargaining sanctioned by the legislature or the courts turned to the New Mexico Attorney General for help.⁵⁶

- **Public Sector Bargaining and the New Mexico Attorney General’s Office**

In 1955, New Mexico Attorney General Richard H. Robinson was asked whether the employees at the New Mexico State Insane Asylum could organize and bargain. Attorney General Robinson in AG Op. No. 55-140 (1955) opined that not only could the employees not collectively bargain but also they could not belong to a union.

Then, in another 1955 attorney general’s opinion, AG Op. No. 55-241 (1955), Attorney General Robinson went on to opine that the prohibition against organizing and bargaining applied to all state and local government employees.

⁵⁴<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/01/03/BA2V1BBGHH.DTL&feed=rss.williesworld#ixzz0bb069dMd>; and, <http://www.examiner.com/sf-in-san-francisco/willie-brown-column-san-francisco-chronicle-drawing-praise-from-california-conservatives>.

⁵⁵ <http://www.reuters.com/article/idUSTRE67F4IY20100816>

⁵⁶ See Stratton, Hal and Farley, Paul, *Office of the Attorney General: History, Powers and Responsibilities*, University of New Mexico Printing Services (1990) at 163-174 for a more thorough history of collective bargaining in New Mexico.

Next, in 1959, Attorney General Hilton A. Dickson, Jr. issued AG Op. No. 59-90 (1959) opining that government employees could organize, but their government employer need not recognize them as a union. Attorney General Dickson further found that government employees could not engage in collective bargaining, strikes or picketing. Attorney General Dickson offered the comment that allegiance to a union and to a municipality was inconsistent.

In 1963, Attorney General Earl E. Hartley issued AG Op. No. 63-52 (1963) which reaffirmed his predecessor's opinions that public sector collective bargaining in New Mexico was not legal.

In 1963, supporters of public sector bargaining in New Mexico began to approach the legislature to enact a specific collective bargaining bill. Between 1963 and 1986, the New Mexico legislature considered at least 17 public sector collective bargaining bills and failed to pass a single one of them. The only exception was a bill to authorize mass transit workers to collectively bargain which was mandated by the Urban Mass Transit Act in order for New Mexico to receive federal mass transit funds.⁵⁷

Then, in 1971, Attorney General David L. Norvell sent a letter to the Ft. Bayard Medical Center informing them that collective bargaining by their employees was not illegal. This letter was considered curious by some, as Attorney General Norvell's Deputy, Oliver E. Payne, had sent a letter two days before to the same recipients informing them that collective bargaining at the institution was illegal.⁵⁸ The record is subject to considerable speculation, but is not clear as to what events occurred during the two days between the two letters to cause such disparate advice from the attorney general's office.

Attorney General Norvell solidified his advice in AG Op. 73-19 (1973) noting that "[the New Mexico Attorney General's] office likewise authorized *permissive* collective bargaining by public employees in New Mexico on April 14, 1971" (emphasis in the original). In this opinion, Attorney General Norvell likened his action in "authorizing" public sector collective bargaining in New Mexico to that of Presidents Kennedy and Nixon when they authorized collective bargaining in various agencies of the federal government by presidential executive order.⁵⁹

I was elected as Attorney General of New Mexico in 1986 after serving eight years in the New Mexico legislature. It was a well known fact when I was in the legislature that a number of state and local government entities were engaging in unauthorized collective bargaining with public sector unions. We knew that collective bargaining in the public sector required a specific statute and that one had not been enacted notwithstanding many attempts. The political status of the legislature at the time was such that supporters of public sector collective bargaining could not get the votes to authorize the practice and opponents could not get the votes to specifically prohibit it.

When it came time to approve collective bargaining agreements with state agencies, I declined to approve them. We then issued AG Op. 87-41 (1987) which effectively adopted the pre-Norvell position of the Attorney General's office opining that public sector collective bargaining in New Mexico was illegal in the absence of a specific authorizing statute by the legislature.⁶⁰

This set off a fire storm of union activity including a visit to New Mexico by César Chávez among others to lead demonstrations against the Office of the New Mexico Attorney General. Litigation ensued

⁵⁷ Id.

⁵⁸ Id. at 166-167.

⁵⁹ Id. at 167.

⁶⁰ Id. at 168.

which led to the opinion of the New Mexico Supreme Court in *American Federation of State, County and Municipal Employees v. Stratton*.⁶¹

I personally argued the case before the New Mexico Supreme Court and based upon the questioning of the Court at oral argument was actually encouraged that the Court might adopt our position that public sector collective is illegal in the absence of a specific state statute which was consistent with the law in the vast majority of states. However, our optimism proved to be misplaced as the Court rendered its opinion stating that although we were correct in declining to approve the state contracts and that our analysis was in accordance with the majority of states' laws, our Court was going to specifically adopt the minority position that public sector bargaining was permissible in the absence of a statute. The Court went on to hold that the New Mexico State Personnel Board could authorize permissive public sector collective bargaining and that they had done so through the promulgation of regulations.⁶² New Mexico thereby joined the minority of states around the country that allow public sector collective bargaining in the absence of specific action of the state legislature.

- **New Mexico Public Sector Bargaining Statutes**

With the advent of the New Mexico Supreme Court adopting what was admittedly a minority opinion, the supporters of public sector collective bargaining then began to approach the legislature in earnest in an effort to get a specific collective bargaining statute passed. They succeeded in this effort in 1992. However, this statute contained a “sunset” clause which caused the bill to expire after 7 years if the legislature did not specifically pass legislation to extend it. The legislature did pass and extension of the act in 1999, however, then Governor Gary Johnson vetoed the legislation.

Collective bargaining supporters in the legislature did not have the votes to override the Governor's veto and the collective bargaining statute passed in 1992 expired and became ineffective.

Governor Bill Richardson campaigned on a platform of enacting a new collective bargaining bill in 2002. After his election, the legislature enacted the New Mexico Public Employees Collective Bargaining Act in 2003 and it was immediately signed into law by Governor Richardson.

- **The New Mexico Public Employees Bargaining Act of 2003**

The New Mexico Public Employees Bargaining Act (PERB) remains in effect today.⁶³ It is a middle of the road bargaining statute. To understand the legislature's intent behind legislation it is helpful to consider the stated purposes of the statute. The purposes of the PEBA as specifically stated by the New Mexico Legislature in the statute are as follows:

1. To promote harmonious and cooperative relationships between public employers and public employees;
2. To protect the public interest by ensuring at all times the orderly operation and functioning of state government;
3. Guarantee rights of public employees to bargain collectively.⁶⁴

⁶¹ 108 N.M. 163, 769 P.2d 76 (1989)

⁶² Id.

⁶³ N.M.S.A. 1978 §§ 10-7E-1 through 10-7E-26 (2003)

⁶⁴ NMSA 1978 § 10-7E-2 (2003)

These are fairly typical and common stated purposes of public sector collective bargaining provisions. However, I believe the New Mexico legislature left one very important purpose, and, in fact, the most important purpose, out. I will discuss that later.

Salient features of the PEBA include providing for state and local government public sector collective bargaining, leaving the determination of union and agency shop provisions to negotiation, a provision for exclusive representation, the prohibition of strikes and lockouts, provisions for mandatory mediation and arbitration for impasse resolution at the state level while allowing alternatives at the local level and importantly, providing that no collective bargaining agreement may conflict with any other state statute passed by the legislature.

One serious flaw in the New Mexico public sector collective bargaining scheme is the omission of a right to work provision. Right to work provisions provide that employees may choose whether to be members of a union. This prevents the employer and the union from including a provision in a bargaining agreement forcing all members of the bargaining unit to be either a member of a union or pay a fee equivalent to union dues. Such a provision is the ultimate fact looked on to determine whether a state is a business/employee friendly state and many companies use this issue as the first factor in determining whether to locate their business within a state.

Twenty-two states have right to work laws, effectively giving workers in those states the right to determine for themselves whether they want to belong to a union or not.⁶⁵ The lack of a right to work law in New Mexico not only strips employees of this right, but also sends a signal nationwide that New Mexico is anti-business and employee rights. The addition of a right to work law in New Mexico would go a long way in reversing New Mexico's anti-business image nationwide.

The Consequences of Public Sector Unions and Collective Bargaining

Nationally, there are now 23 million government employees and 20 million of these employees work for state and local government. The 2008 cost for state employees was \$1.1 trillion which amounted to one half of total local and state spending. Also, in 2009, for the first time in the nation's history, there were more public sector union members than those in the private sector, where 7.9 million employees were members of public sector unions and 7.4 million were member of unions in the private sector. This amounted to 37.4% of the public sector workforce being unionized as compared to only 7.2% in the private sector.⁶⁶

The cost of government employees has grown commensurately with the rise of public sector union membership. From 1950 to 1980, private sector and government sector employment grew at about the same rate. But more recently, government sector employment has grown out of proportion with that of the private sector. In 2008 the average private sector compensation was \$59,909 (including \$9,881 in benefits) compared to \$67,812 (including \$15,761 in benefits) in the public sector.

In 2009, the average government wage advantage of the government sector compared to the private sector was \$39.66 per hour to \$27.42 per hour. Due to the fact that private sector workers work more hours during the year than their counterparts in the public sector (2050 to 1825 hours per year)

⁶⁵ www.nrtw.org/d/rtwempl.htm

⁶⁶ Edwards (Spring 2010)

average public sector compensation is actually 45% higher than the private sector. This breaks down to an advantage in the public sector of 34% in wages and 74% in benefits.⁶⁷

Not surprisingly, public sector employee benefits lead the private sector in every category. The following is a table of the percentage of public and private sector employees who receive benefits in each category:

	<u>Public</u>	<u>Private</u>
Health Care Benefits	88%	71%
Retirement Plans		
Total	99%	76%
Part Time	90%	67%
Life Insurance	80%	59%
Paid Sick Leave	89%	61%

There is some faintly good news for New Mexico, however. Public sector unions, although exerting an inordinate amount of influence over particularly Democrat politicians and how they vote, have not been given complete control of state government. As of 2008, 12.5% of the state and local government workforce was unionized in New Mexico.⁶⁸ Notwithstanding this relative low percentage of public sector union membership, the union efforts at electing friendly politicians has resulted in average annual compensation for state and local government employees as of 2008 to be \$64,432 according to the Edwards (2010) study.⁶⁹

- **Unfunded pensions and other retiree benefits**

It is one thing for the taxpayer to shoulder and have to pay for the bloated annual expenditures of government on a recurring annual basis. However, a much more serious problem looms for all governmental entities: an ever increasing and alarmingly high sovereign debt. It is often believed that state and local governments cannot incur debt. However, that concept has become antiquated and a myth. Unfunded government liabilities threaten to bankrupt many state and local governments.

Recently, it seems the media and the public has awakened to the problem of “underfunded” government pensions. In February of 2010, the PEW Center on the States issued its report: *The trillion dollar gap: Underfunded state retirement systems and the roads to reform*. This study found that as of 2008 there was a \$1 trillion gap between the \$2.35 trillion the states and local governments had set aside for funding employees’ benefits and the \$3.35 trillion which has been promised to such employees under the terms of the plans.⁷⁰ PEW notes their calculations are conservative in reaching this figure and others have found these estimates to be severely underestimated. Robert Novy-Marx and Joshua H. Rauh have argued that such government pensions are really underfunded by \$3.2 trillion while using more realistic assumptions⁷¹

⁶⁷ Id.

⁶⁸ Id. at 105.

⁶⁹ Id.

⁷⁰ PEW \$1trillion report gap report at 1.

⁷¹ Novy-Marx, R., and Rauh, J.D., *Journal of Economic Perspectives—Volume 23, Number 4—Fall 2009—Pages 191–210*

In addition to retirement benefits, health care and other non-pension benefits are also underfunded by \$555 billion according to the PEW Report. But, Edwards and Gokhale have estimated that this figure as of 2006 to be \$1.4 trillion, using different assumptions.⁷²

As of June 30, 2008, New Mexico's unfunded pension liability was \$4,519,887,000 while the unfunded retiree health care liability was an additional \$2,946,290,000.⁷³ Neither estimate includes the recent financial turmoil which has surely increased these reported liabilities. So, as New Mexico politicians debate each year's general fund shortfall, which could be as much as \$235 million this year,⁷⁴ one should remember the nearly \$7.5 billion in unfunded pension and health care obligations the taxpayers and their grandchildren have to bear. Paying for this obligation in the future makes resolving each year's general fund deficit look like child's play by comparison.⁷⁵

- **Increasing numbers of state government employees and budgets**

In 2008, state and local government employed 25.3 people for every 100 people employed by the private sector in New Mexico. Relative to the national average of 16.72, New Mexico's state and local government employment ratio is 51 percent higher and is the second highest ratio in the country.⁷⁶

There is only one place for the state to obtain the funds needed to pay for all of this government in New Mexico—taxes. A recent article at Forbes.com rated New Mexico up with the likes of California, New York, and New Jersey for its high tax burden citing a study by the Pacific Legal Foundation.⁷⁷ The study equally weighted each state's burden of government derived from the total of local and state government spending as a percentage of the state's economy and the design of the state's tax system. New Mexico came in 41st with California leading the way at 50th.⁷⁸

So, although New Mexico rates 48th in the country for median family income and 3rd in the country in percent of individuals living below the poverty level,⁷⁹ we still get to compete with the likes of California (see previous discussion for their great track record) for worst state for taxpayers.

And, we have been on a spending binge in state government to boot. The New Mexico state budget for FY 2001 was \$3,543,300,000.⁸⁰ The state government grew to \$6,015,000,000 in FY 2008, a whopping 70% increase in state spending over the course of eight years. And now, even with a reduction of spending to \$5,719,000,000 for the current fiscal year, we will still see the legislature return in January

⁷² Edwards, D., and Gokhale, J. (2006) "Unfunded State and Local Health Costs: \$1.4 Trillion." Cato Institute: Tax and Budget Bulletin No. 40 (October).

⁷³ PEW (2010) at 4 and 6.

⁷⁴ *Analysis: N.M. Gubernatorial Candidates Make Iffy Budget Promises*, Barry Massey, Associated Press, Albuquerque Journal, Monday, August 30, 2010; <http://legis.state.nm.us/lcs/lfc/lfcdefault.aspx>.

⁷⁵ Some commentators allege that pension abuse is a large part of the underfunding problem. The scope of abuses is too broad for this paper, but these abuses can include early retirement, double dipping, pension spiking, false disability claims, excessive pension benefits, overpromising benefits and pay-to-play corruption. See Edwards (Winter 2010) at 93-95' See also Stratton (1989) at 174-185 for a rendition of efforts of the New Mexico Attorney General's Office to remedy some of these abuses in New Mexico

⁷⁶ Moody, J. Scott, and Warcholik, Wendy P., (2009) "The Government 'Gravy Train' An Analysis of New Mexico's Private versus Public Sector Employment and Compensation (Updated).

⁷⁷ <http://www.forbes.com/2010/04/26/tax-burden-california-state-government-opinions-contributors-jason-clemens-robert-murphy.html>

⁷⁸ Murphy, R. P., and Clemons, J. (April 15, 2010) *Taxifornia*, Pacific Research Institute.

⁷⁹ <http://www.statemaster.com/state/NM-new-mexico/eco-economy>

⁸⁰ I can't help but make a personal comment here. When I was elected to the legislature in the late 1970s the state budget was an unimaginable (at that time) \$700,000,000. We didn't even know how to say the word "billion" in those days.

of 2011 and have to deal with a budget deficit for the current fiscal year of something approaching \$235 million.⁸¹

No doubt, the New Mexico legislature will once again be calling upon taxpayers (who already carry a tax burden in the same league as California) and families who rank 48th in the country in median income to pick up the tab for a government that is top heavy with public employees and government spending. We will continue to endure this as public sector unions and the politicians they support continue to push for higher wages, benefits and job security for their members.

Public Sector Collective Bargaining and the Public Interest

Private sector unionism is adversarial. One side is trying to get as much money as it can and the other is trying to pay as little money as it can. Public sector unionism can be adversarial or collusive. Public sector unions elect management and office holders to extract higher compensation from their government employers who fund the increases in one way—taxes paid by taxpayers. And, in the public sector, those who are bargaining on behalf of the government are not worrying about paying higher compensation to public employees with their own money as is the case in the private sector. The taxpayer is at considerable risk regardless of who is in control of the government during negotiations.

In the private sector, if a union and its members extract concessions or wages out of their employer that are too high and raise the cost of the private sector service or product, a prospective consumer can refuse to pay the higher compensation by refusing to buy the product or service. A consumer in the private sector has a number of choices when it comes to purchasing products and services which cause the companies from which the consumer purchases products and services to be as efficient as possible so as to be able to compete effectively in the market.

As an example, consumers who feel the price of a GM car is too high due to excessive employee compensation paid by GM along with other inefficiencies can buy a Toyota or other brand of automobile instead of a General Motors automobile and thus avoid having to pay for the inefficiencies which eventually caused General Motors to go bankrupt.

However, if government employees get paid at a level that a consumer considers too high thus making government services too expensive, there is no other place for the consumer to go. Government exerts a monopoly over the services it renders and there is no other place for the consumer to obtain such services. This makes the consumer of monopoly government services a captive of the government. And, taxpayers certainly can't refuse to pay their taxes on account of government being inefficient and paying too much compensation to its employees. So, in a way, the difference between collective bargaining in the private sector and the public sector is as simple as that—consumers of government services are captive and have no choice whether to pay for such service, while consumer in the private sector can choose whether to use and thus pay for a service rendered by a private sector company.

Another manner in which to analysis collective bargaining in the public sector is to make a determination of what is in the overall public interest. As pervasive as government has become in our lives, most would still agree that government exists to serve the people and not simply as a jobs or welfare program existing for the purpose of employing government workers. Keeping this premise in mind, the following factors serve the public interest when analyzing public sector employment and bargaining:

- Within government there should be a peaceful and stable employer-employee relationship.

⁸¹ See fn. 74 *supra*.

- The government should protect all public employees' rights.
- The government should provide all services in the most efficient manner possible.
- *The rights of citizens to control government policy and the cost of their government through elected representatives should be protected.*

As discussed earlier it is notable that the New Mexico Public Employees Bargaining Act includes within its stated purposes the first three points set forth above, but not the last, and arguably most fundamental purpose. In other words, it is not a stated purpose or the intent of the New Mexico act to allow citizens the right through their elected representatives to control their government. It appears that public sector collective bargaining in New Mexico only exists, under the terms of the statute, for the purpose of protecting public sector unions and to provide a mechanism for public employees to obtain ever increasing compensation at the expense of the taxpaying public.

But, does public sector collective bargaining really achieve these stated purposes anyway? I would argue not. Lets critically examine them:

1. Peaceful and stable employer-employee relationship

Does collective bargaining and worker unionization really promote peace and harmony between employers and employees? The empirical evidence does not support this contention. For instance, where strikes and picketing are allowed, strikes and picketing could hardly be said to increase harmony between employers and employees. Prior to 1958, there were 15 strikes against government. Then, after public sector collective bargaining began to grow thereafter and be allowed by states, by 1980 there were 536 strikes against government. In Michigan, there was one strike before collective bargaining was instituted in 1965 and 759 strikes between 1965 and 1980. Pennsylvania endured the same experience seeing 72 strikes in the 12 years prior to instituting public sector collective bargaining and 767 strikes in the 11 years after passage.⁸²

It can hardly be said that picketing or other job actions are a harmonious activity. The mere process of bargaining, mediating and arbitrating a collective bargaining agreement is adversarial by its very nature.

2. Protection of all employees' rights.

Does collective bargaining protect all the rights of public employees? An examination of the statutes and the process indicate it does not.

Public employees all have a right to join a union, a right which is protected by the First Amendment to the United States Constitution. However, beyond this constitutional protection of employee's rights, the process of collective bargaining provides for the protection of the union and not the individual employee. As an example, all public sector collective bargaining statutes, including New Mexico's, provide for exclusive representation of the entire bargaining unit by the union, regardless of whether an employee wants to be represented by the union or not.

This means that after a public sector union wins an election, the union is the sole representative of the employees in the bargaining unit, including union and non-union employees. An individual employee

⁸² Edwards (2010)

in the bargaining unit may not choose another representative to bargain for him or bargain for himself, but rather must accept the certified union as his sole representative before his government employer.

Also, in many jurisdictions, an employee may have to join or pay a fee equivalent to dues to the union, whether the employee wants to or not. In other jurisdictions this type of provision establishing what is referred to as a union or agency shop may be the subject of collective bargaining negotiation. Such mandatory union provisions can hardly be said to protective the rights of individual employees, when the union makes the choice of whether they join or not.

3. Efficient delivery of public services

Public sector collective bargaining does not in anyway provide for more efficient government. First, a whole new bureaucracy is set up to handle the public sector collective bargaining process, in the case of New Mexico it is the Public Employees Labor Relations Board. Next, collective bargaining, when it fails to result in an agreement can result in both legal and illegal strikes, sick outs and slow downs which disrupt the delivery of governments services.

But, possibly most importantly the very nature of the product of collective bargaining, a binding union contract, binds the hands of public officials to make future decisions as to how to run and fund the government. In hard economic times, public officials may be bound by the contract when it would be more prudent to adjust the salaries and benefits of the public employees. This can result in the necessity of actually laying off public employees who might otherwise be retained if there were more flexibility to adjust employee compensation.

It is seldom that a union will cooperate in accepting lower compensation for its members regardless of what may be happening in the overall economy. A recent good example of this situation has been the acrimonious negotiations between the City of Albuquerque and its unions this year. While many in the private sector were experiencing pay cuts, and worse, losing their jobs, unions representing Albuquerque city workers were arguing over whether to accept a 1 ½ % pay cut.⁸³

4. Public control of government through elected representatives

Public sector collective bargaining laws compel elected public officials to recognize and bargain with public sector unions. This imposition on any elected official takes away the right of that public official to make certain decisions for which they are elected just by virtue of the fact that collective bargaining is mandatory. The decision-making process is then not exercised by the elected official, but rather by the process of collective bargaining between union representatives and unelected government managers.

In every instance, by law the public employer must bargain “in good faith.” The courts have interpreted “good faith” to be a willingness to grant some concessions to union demands. So, in addition to being forced to bargain, the elected official is required to make concessions to the union, or be guilty of “bad faith” bargaining, regardless of the fiscal circumstances of the governmental entity he or she represents.

The very nature of the bargaining process is adversarial. The union is trying to obtain higher compensation and more rights for its members while the elected official, at least theoretically (unless he

⁸³ *Labor Talks Anger Dems*, Albuquerque Journal, July 13, 2010; *Mayor Cuts Pay for City Workers*, Albuquerque Journal, July 2, 2010.

or she is elected with union support), is attempting to obtain a fair agreement for the government employer. If an agreement is not reached, various provisions provide that the union may call a strike of its members or engage in mandatory arbitration of the terms of the contract being negotiated. The later process usually begins with mediation where an independent mediator attempts to get the parties to compromise their positions and come to an agreement.

If mediation between the union and government entity fails, the process goes to mandatory arbitration. There the parties present their case to an arbitrator who makes a decision as to what the contract should contain which decision is binding on the parties and is not appealable to any court. And, most binding arbitration provisions provide that an arbitrator will award no less than management's final offer. There is, therefore, no reason for the union not to go to arbitration. It is going to receive, at least, what the employer offered and usually more.

The process as described above takes various forms of the governmental decision making out of the hands of duly elected officials and transfers it to unions, unelected government managers and independent unelected mediators and arbitrators. The process results in a contract which binds the elected officials and the governmental entity involved. The one party not involved in the process is the citizen who elected the official to represent him and run government and the taxpayer who has to pick up the tab for the results of the public sector collective bargaining process.

Recommendations for New Mexico

What can New Mexico do to avert bankruptcy and secure a sound financial future for all workers?

- First and foremost, we must consider abolishing public-sector collective bargaining New Mexico. Only about half of all states (including New Mexico) allow this practice and it disproportionately enhances the power of public employee unions. New Mexico should follow the lead of Virginia and other states that do not allow public employees to bargain collectively;
- Secondly, New Mexico must transfer all new hires into defined contribution and out of defined benefit retirement programs;
- Thirdly, it is imperative that New Mexico become a "Right to Work" state in which workers are not forced to join a union in order to hold a particular job;
- Fourthly, policymakers must trim overall state spending and the government work force. New Mexico has the second most state and local workers per private sector employee in the nation. This needs to change;
- Finally, New Mexico needs to stop relying on federal largesse for economic development and instead adopt low, flat, fair, and equitable tax and regulatory policies that will encourage private-sector growth.

With the economy in the doldrums and showing no signs of a great recovery, governments will remain financially-strapped. Government workers have done better in good times and bad than their private sector counterparts. Their numbers and benefits should be the focus of all who are serious about preserving the Land of Enchantment for future generations.